

IN THE COURT OF APPEALS OF THE STATE OF IDAHO

Docket No. 34234

MICHAEL D. WHITELEY,)	2008 Unpublished Opinion No. 582
)	
Petitioner-Appellant,)	Filed: August 6, 2008
)	
v.)	Stephen W. Kenyon, Clerk
)	
STATE OF IDAHO,)	THIS IS AN UNPUBLISHED
)	OPINION AND SHALL NOT
Respondent.)	BE CITED AS AUTHORITY
)	

Appeal from the District Court of the Seventh Judicial District, State of Idaho, Bonneville County. Hon. Gregory S. Anderson, District Judge.

Order summarily dismissing petition for post-conviction relief, affirmed.

Michael Whiteley, Boise, pro se appellant.

Hon. Lawrence G. Wasden, Attorney General; Daniel W. Bower, Deputy Attorney General, Boise, for respondent.

LANSING, Judge

In this action Michael D. Whiteley seeks relief from his 1991 judgment of conviction for first degree kidnapping and rape. The action was summarily dismissed by the district court, and we affirm.

I.

BACKGROUND

In 1991, Whiteley was convicted for the first degree kidnapping and rape of his ex-wife. The judgment of conviction and sentences were affirmed by this Court in *State v. Whiteley*, 124 Idaho 261, 858 P.2d 800 (Ct. App. 1993). Whiteley thereafter filed a timely petition for post-conviction relief. During the course of that proceeding he filed a motion to disqualify District Judge Marvin Smith, who had presided at Whiteley's criminal trial, on the ground that the judge had tampered with the jury during its deliberations in Whiteley's trial. Judge Smith recused himself, and the post-conviction case proceeded before a different judge. The district court ultimately granted relief in that first post-conviction action, set aside Whiteley's conviction, and

granted a new trial. The Idaho Supreme Court, however, reversed the district court's decision and reinstated Whiteley's conviction. *Whiteley v. State*, 131 Idaho 323, 955 P.2d 1102 (1998). Apparently, Whiteley thereafter filed three more post-conviction actions in 2001, 2002, and 2006.¹ In August 2006, Whiteley filed the petition that initiated the present post-conviction action. His petition alleges that he is entitled to a new trial because Judge Smith tampered with the jury in the 1991 trial.²

The district court issued a notice of intent to dismiss this petition for several reasons, including that it is a successive petition for post-conviction relief prohibited by Idaho Code § 19-4908. Because we find that the petition was correctly dismissed on this basis, we do not address the other grounds relied upon by the district court.

Idaho Code § 19-4908 prohibits the filing of successive petitions for post-conviction relief except in very limited circumstances. It states:

All grounds for relief available to an applicant under this act must be raised in his original, supplemental or amended application. Any ground finally adjudicated or not so raised, or knowingly, voluntarily and intelligently waived in the proceeding that resulted in the conviction or sentence or in any other proceeding the applicant has taken to secure relief may not be the basis for a subsequent application, unless the court finds a ground for relief asserted which for sufficient reason was not asserted or was inadequately raised in the original, supplemental, or amended application.

By operation of this statute, any grounds for relief that were not raised in an earlier petition cannot be raised in a subsequent petition if the grounds were known or should have been known

¹ The record on appeal does not contain the record from any of Whiteley's preceding post-conviction cases. In its respondent's brief, the State has cited to the records in some of the preceding cases, but neither party moved to augment the record in this appeal to include records from those cases, and we therefore do not consider the State's assertions concerning their contents. We rely instead upon Whiteley's allegations in his pleadings regarding his litigation history, the few documents from prior cases that Whiteley attached to his pleadings in the present case, and the district court's description of Whiteley's litigation history in its notice of intent to dismiss the present action.

² Whiteley originally captioned this case as "Michael D. Whiteley v. Marvin M. Smith, attorney, and ex-trial judge." However, the prayer for relief plainly seeks only relief against the State, including vacating his judgment of conviction, and does not seek any recovery against the former judge personally. Therefore, the case was properly treated by the district court as a post-conviction action, and during this appeal the Idaho Supreme Court ordered that the case caption be amended to reflect its true character.

to the petitioner at the time of the earlier petition unless the petitioner shows “sufficient reason” why the claim was not asserted in the earlier case. *Stuart v. State*, 118 Idaho 932, 933-34, 801 P.2d 1283, 1284-85 (1990); *Palmer v. Dermitt*, 102 Idaho 591, 635 P.2d 955 (1981); *Hooper v. State*, 127 Idaho 945, 947, 908 P.2d 1252, 1254 (Ct. App. 1995). Whiteley has not met his burden to show a “sufficient reason” for not including this claim of jury tampering in his first petition for post-conviction relief or in any of the multiple post-conviction actions that he filed thereafter. It is indisputable that Whiteley was aware of the alleged facts underlying this claim when his first petition was filed, for he filed a motion in that post-conviction action to disqualify the presiding district judge on the basis of this same alleged jury tampering; and Whiteley’s own pleadings and affidavit in this case assert that he became aware of the alleged jury tampering when it occurred. Perhaps it would be reasonable for a defendant to omit such a claim from a post-conviction petition when the same judge who allegedly engaged in the misconduct is presiding in the post-conviction case, but Whiteley successfully moved to disqualify Judge Smith from his first post-conviction case and thereafter amended his petition. He apparently did not raise this claim in the amended petition or in any of the several petitions for post-conviction relief that he filed thereafter. Accordingly, relief on the current petition is barred by I.C. § 19-4908, and the district court correctly dismissed the action.

Perhaps in an effort to avoid the application of section 19-4908 and of the statute of limitation applicable to post-conviction actions, I.C. § 19-4902(a), Whiteley filed a motion in the present case to change the title of his petition to “Motion to Reopen.” Exactly what prior proceeding he was moving to reopen is not clear, but whether Whiteley sought to reopen the criminal case or his first post-conviction action, the motion was untimely. A motion for a new trial in a criminal case based upon newly discovered evidence must be filed within two years after final judgment, and such a motion on any other grounds must be made within fourteen days after imposition of sentence. Idaho Criminal Rule 34. A motion for a new trial in a post-conviction action must be filed within fourteen days after entry of judgment. Idaho Rule of Civil Procedure 59(b). Therefore, if the present case were recharacterized as a motion to reopen one of those prior proceedings, it would be many years too late and would not avoid dismissal.

On appeal, Whiteley has argued that he should be excused from any procedural bar arising from his failure to raise this jury tampering claim in earlier proceedings because no law library is available to him at the Department of Correction facility where he is incarcerated. He

contends the absence of a law library deprived him of access to the courts. *See Bounds v. Smith*, 430 U.S. 817, 821 (1977). We need not address this argument at length because in Whiteley's first post-conviction action, where he could have presented the present jury tampering claim, he was represented by an attorney. Moreover, he found it possible to file several more post-conviction actions thereafter. Therefore, the absence of a prison law library could not have hampered his ability to pursue this claim.

For the foregoing reasons, the district court's order summarily dismissing this action for post-conviction relief is affirmed.

Chief Judge GUTIERREZ and Judge PERRY **CONCUR.**